

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

XAVIER HERNANDEZ-ALBINO

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

CIVIL 11-1040 (DRD)  
(CRIMINAL 07-0126(DRD))

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This matter is before the court on motion filed by petitioner Javier Hernandez-Albino on January 18, 2011, to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. (Docket No. 1.) The government opposed the motion to vacate sentence on April 27, 2011. (Docket No. 3.) Petitioner filed a reply to the response on May 31, 2011 (Docket No. 4.)

Having considered the arguments of the parties and for the reasons set forth below, I recommend that the petitioner's motion to vacate sentence be DENIED as untimely.

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 20, 2008, petitioner pleaded guilty to count three of a 10-count second superceding indictment in which he was charged in five counts. Specifically he pleaded guilty under Fed. R. Crim. P. 11(c)(1)(C) to the charge of aiding and abetting in that he did unlawfully obstruct, delay ,and affect, and

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4 attempt to obstruct, delay, and affect, commerce as that term is defined in Title  
5 18, United States Code, Section 1951(b)(3), and the movement of articles and  
6 commodities in such commerce, by robbery, as that term is defined in Title 18  
7 United States Code, Section 1951(b)(1), that defendants did, knowingly,  
8 intentionally and unlawfully take and obtain property of Loomis Fargo at the time  
9 in the custody of JNH, a male person of legal age, employed by Loomis Fargo as  
10 guard/operator, consisting of approximately nine hundred and forty-four thousand  
11 two hundred twenty-five dollars (\$944,225), against his will, by means of actual  
12 and threatened force, violence, and fear of injury, immediate and future, to his  
13 person. All in violation of Title 18, United States Code, Sections 1951(a) and 2.  
14 (Criminal 07-0126 (ADC), Docket No. 350.) According to the plea agreement  
15 signed by petitioner, the other counts in which he was charged were to be  
16 dismissed at the time of sentence.  
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20 The plea agreement was entered on the same day that petitioner entered  
21 a guilty plea. The terms of the agreement related to count three of the  
22 superceding indictment called for a base offense level of 20, pursuant to U.S.S.G.  
23 § 2B3.1 (robbery); a six-level enhancement pursuant to U.S.S.G. §  
24 2B3.1(b)(2)(6)(for use of a firearm during a robbery), another two-level  
25 enhancement pursuant to U.S.S.G. § 2B3.1(b)(2)(F); and another two-level  
26 enhancement pursuant to U.S.S.G. § 2B3.1(b)(7)(E). Petitioner was awarded a  
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4 two-level decrease for acceptance of responsibility, pursuant to U.S.S.G. §  
5 3E1.1(b). A total offense level of 30 was reached which provided for a sentencing  
6 range in the advisory guidelines of 97-121 months. Petitioner was sentenced  
7 under Fed. R. Crim. P. 11(c)(1)(C) to a term of imprisonment of 108 months or  
8 9 years. It was also agreed that no further adjustments would be sought by the  
9 parties. (Criminal 07-0126 (ADC), Docket No. 350 at 4.)  
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11 The sentencing hearing was held on June 27, 2008. (Criminal 07-0126  
12 (ADC), Docket No. 510.) After carefully reviewing the terms and conditions of  
13 the agreement, the court accepted it and sentenced the petitioner to 108 months  
14 of imprisonment as to count three. Judgment was entered on July 1, 2008. No  
15 notice of appeal was filed. The only post sentence motion filed in the criminal  
16 case was a motion to release bond.  
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18 On January 18, 2011, petitioner filed a motion to vacate, set aside or  
19 correct sentence pursuant to 28 U.S.C. § 2255. Petitioner claims that he was not  
20 effectively represented by his attorney Luis R. Rivera Gonzalez. He claims that  
21 this was his first offense, and that he received a six level enhancement based  
22 upon the firearm. He argues that his sentence was invalid because it was  
23 imposed under the mandatory scheme rather than the advisory scheme and that  
24 this was preserved at sentencing. Petitioner protests the excessive amount of the  
25 restitution, \$157,370.83, and that he has no way of paying the same. He says  
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4 that he was told by his attorney that he could not appeal nor bring these issues  
5 up in a post conviction motion. In relation to why his petition is late, he describes  
6 remedies under Rule 32(d) of the Federal Rules of Criminal Procedure, discussing  
7 the juxtaposition of review under §2255 and Rule 32(d). He also discusses broad  
8 concepts of due process. Finally, petitioner seeks to remove the handgun charge  
9 by reducing the six-level enhancement and also eliminate the restitution.  
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11 On April 27, 2011, the government opposed the petitioner's motion arguing  
12 basically that it should be summarily denied as untimely. ( Docket No. 3.) It  
13 notes that the conviction became final on July 11, 2008. Therefore petitioner had  
14 until July 13, 2009 to file a §2255 petition. It was filed over 21 months beyond  
15 the due date. Therefore, the petition invites dismissal. (Id. at 3.)  
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17 Petitioner filed objections to the response in opposition on May 31, 2011.  
18 (Docket No. 4). Much of the argument is repetitive, including the adoption of the  
19 government's brief in his reply, but stressing that the firearm charge was  
20 incorrectly included under Booker. (In United States v. Booker, the Supreme  
21 Court held that the Federal Sentencing Guidelines implicate the Sixth Amendment  
22 and struck down the section which made the Guidelines mandatory. United States  
23 v. Booker, 543 U.S. 220, 233-37 (2005)). Petitioner discusses legal concepts  
24 of equity at length, the need for flexibility, and the requirements of equitable  
25 tolling. He argues that the Antiterrorism and Effective Death Penalty Act of 1996  
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4 ("AEDPA") does not set forth an inflexible rule in relation to the time limits  
5 imposed. Petitioner stresses that he has pursued his case diligently in general  
6 terms. He also notes that t he restitution increases his punishment.  
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## 8 II. ANALYSIS

9 Under section 28 U.S.C. § 2255, a federal prisoner may move for post  
10 conviction relief if:

11 the sentence was imposed in violation of the Constitution  
12 or laws of the United States, or that the court was  
13 without jurisdiction to impose such sentence, or that the  
14 sentence was in excess of the maximum authorized by  
law, or is otherwise subject to collateral attack . . . .

15 28 U.S.C. § 2255(a); Hill v. United States, 368 U.S. 424, 426-27 n.3 (1962);  
16 David v. United States, 134 F.3d 470, 474 (1st Cir. 1998).  
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18 The burden is on the petitioner to show his or her entitlement to relief under  
19 section 2255, David v. United States, 134 F.3d at 474, including his or her  
20 entitlement to an evidentiary hearing. Cody v. United States, 249 F.3d 47, 54  
21 (1st Cir. 2001) (quoting United States v. McGill, 11 F.3d 223, 225 (1st Cir.  
22 1993)). It has been held that an evidentiary hearing is not necessary if the 2255  
23 motion is inadequate on its face or if, even though facially adequate, "is  
24 conclusively refuted as to the alleged facts by the files and records of the case."  
25 United States v. McGill, 11 F.3d at 226 (quoting Moran v. Hogan, 494 F.2d 1220,  
26 1222 (1st Cir. 1974)). "In other words, a '§ 2255 motion may be denied without  
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4 a hearing as to those allegations which, if accepted as true, entitle the movant to  
5 no relief, or which need not be accepted as true because they state conclusions  
6 instead of facts, contradict the record, or are 'inherently incredible.'" United  
7 States v. McGill, 11 F.3d at 226 (quoting Shraiar v. United States, 736 F.2d 817,  
8 818 (1st Cir. 1984)). A claim of ineffective assistance of counsel is, without  
9 question, one such constitutional violation that may be raised by way of a 2255  
10 motion. See United States v. Kayne, 90 F.3d 7, 14 (1st Cir. 1996).

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13       Petitioner argues that his attorney told him he could not appeal or raise  
14 these issues by filing any post conviction motion. (Docket No. 1at 4). "In all  
15 criminal prosecutions, the accused shall enjoy the right to ... the Assistance of  
16 Counsel for his defence." U.S. Const. amend. 6. To establish a claim of  
17 ineffective assistance of counsel, a petitioner "must show that counsel's  
18 performance was deficient," and that the deficiency prejudiced the petitioner.  
19 Strickland v. Washington, 466 U.S. 668, 687 (1984). "This inquiry involves a two-  
20 part test." Rosado v. Allen, 482 F. Supp. 2d 94, 101 (D. Mass. 2007). "First, a  
21 defendant must show that, 'in light of all the circumstances, the identified acts or  
22 omissions were outside the wide range of professionally competent assistance.'" Id.  
23 (quoting Strickland v. Washington, 466 U.S. at 690.) "This evaluation of  
24 counsel's performance 'demands a fairly tolerant approach.'" Rosado v. Allen, 482  
25 F. Supp. 2d at 101 (quoting Scarpa v. DuBois, 38 F.3d 1, 8 (1st Cir. 1994)). "The  
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4 court must apply the performance standard 'not in hindsight, but based on what  
5 the lawyer knew, or should have known, at the time his tactical choices were  
6 made and implemented.'" Rosado v. Allen, 482 F. Supp. 2d at 101 (quoting  
7 United States v. Natanel, 938 F.2d 302, 309 (1st Cir. 1991)). The test includes  
8 a "strong presumption that counsel's conduct falls within the wide range of  
9 reasonable professional assistance." Smullen v. United States, 94 F.3d 20, 23  
10 (1st Cir. 1996) (quoting Strickland v. Washington, 466 U.S. at 689). "Second, a  
11 defendant must establish that prejudice resulted 'in consequence of counsel's  
12 blunders,' which entails 'a showing of a "reasonable probability that, but for  
13 counsel's unprofessional errors, the result of the proceeding would have been  
14 different.'"" Rosado v. Allen, 482 F. Supp. 2d at 101 (quoting Scarpa v. DuBois,  
15 38 F.3d at 8) (quoting Strickland v. Washington, 466 U.S. at 694.) However,  
16 "[a]n error by counsel, even if professionally unreasonable, does not warrant  
17 setting aside the judgment of a criminal proceeding if the error had no effect on  
18 the judgment." Argencourt v. United States, 78 F.3d 14, 16 (1st Cir. 1996)  
19 (quoting Strickland v. Washington, 466 U.S. at 691). Thus, "[c]ounsel's actions  
20 are to be judged 'in light of the whole record, including the facts of the case, the  
21 trial transcript, the exhibits, and the applicable substantive law.'" Rosado v. Allen,  
22 482 F. Supp. 2d at 101 (quoting Scarpa v. DuBois, 38 F.3d at 15.) The defendant  
23 bears the burden of proof for both elements of the test. Cirilo-Muñoz v. United  
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4 States, 404 F.3d 527, 530 (1st Cir. 2005), cert. denied, 130 S. Ct. 1103 (2010),  
5 (citing Scarpa v. DuBois, 38 F.3d at 8-9.)

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7 In Hill v. Lockhart the Supreme Court applied Strickland's two-part test to  
8 ineffective assistance of counsel claims in the guilty plea context. Hill v. Lockhart,  
9 474 U.S. 52, 58 (1985) ("We hold, therefore, that the two-part Strickland v.  
10 Washington test applies to challenges to guilty pleas based on ineffective  
11 assistance of counsel."). As the Hill Court explained, "[i]n the context of guilty  
12 pleas, the first half of the Strickland v. Washington test is nothing more than a  
13 restatement of the standard of attorney competence already set forth in [other  
14 cases]. The second, or 'prejudice,' requirement, on the other hand, focuses on  
15 whether counsel's constitutionally ineffective performance affected the outcome  
16 of the plea process." Hill v. Lockhart, 474 U.S. at 58-59. Accordingly, petitioner  
17 would have to show that there is "a reasonable probability that, but for counsel's  
18 errors, he would not have pleaded guilty and would have insisted on going to  
19 trial." Id. at 59.

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22 Undoubtedly, petitioner was made aware, consistent with the plea  
23 agreement, that the court could impose a sentence in accordance with the  
24 applicable provisions of the Sentencing Guidelines, 18 U.S.C. § 3551 et seq.,  
25 which are now and were then advisory. Petitioner was also aware that, pursuant  
26 to Federal Rule of Criminal Procedure 11(c)(1)(C), the court may accept or reject  
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Aside from the issue related to the conversation with the attorney about appeal and post conviction motion, a totally undeveloped argument, there were no surprises at sentencing since petitioner received exactly what he had bargained for. Thus there was no Sixth Amendment violation caused by his attorney. In relation to the enhancement and restitution issues, the argument revolves more around the court's actions rather than the attorney's actions. In any event, there are no grounds present for considering this extraordinary remedy, particularly since the motion is untimely.

The Antiterrorism and Effective Death Penalty Act instituted a limitations period of one year from the date on which a prisoner's conviction became final within which to seek federal habeas relief. 28 U.S.C. §2255(f). The current petition was clearly filed more than two years from the date petitioner's sentence

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4 became final and unappealable. However, the inquiry does not necessarily stop  
5 there. In its pertinent part, section 2255 reads:

6 A 1-year period of limitation shall apply to a motion under  
7 this section. The limitation period shall run from the  
8 latest of–

9 (1) the date on which the judgment of conviction  
becomes final;

10 (2) the date on which the impediment to making a motion  
11 created by governmental action in violation of the  
12 Constitution or laws of the United States is removed, if  
the movant was prevented from making a motion by such  
13 government action;

14 (3) the date on which the right asserted was initially  
15 recognized by the Supreme Court, if that right has been  
newly recognized by the Supreme Court and made  
16 retroactively applicable to cases on collateral review; or

17 (4) the date on which the facts supporting the claim or  
18 claims presented could have been discovered through the  
exercise of due diligence.

19 28 U.S.C. § 2255(f).

20 The focused argument of the United States, that the petition is time-barred,  
21 is correct. The petition does not describe any circumstances that fall within any  
22 of the exceptions which would equitably toll the limitations period of the statute.

23 See e.g. Ramos-Martinez v. United States, 638 F.3d 315, 321-24 (1<sup>st</sup> Cir. 2011).

24 To carry the burden of establishing the basis for equitable tolling, the petitioner  
25 must show “ ‘ (1) that he has been pursuing his rights diligently, and (2) that  
26 some extraordinary circumstance stood in his way’ and prevented timely filing.”  
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4 Id. at 323, quoting Holland v. Florida, 130 S. Ct. 2549, 2562 (2010), which in turn  
5 quotes Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005), cited in Santana v. United  
6 States, 2012 WL 426672 (Feb. 9, 2012); cf. Maples v. Thomas, 132 S.Ct. 912,  
7 922-23 (2012). There are no extraordinary circumstances present which support  
8 a favorable invocation of entitlement to equitable relief. There is no showing of  
9 reasonable or due diligence on the part of the petitioner in seeking relief. See  
10 Barreto-Barreto v. United States, 551 F.3d 95, 101 (1<sup>st</sup> Cir. 2008); Cordle v.  
11 Guarino, 428 F.3d 46, 48-49 (1<sup>st</sup> Cir. 2005); Akins v. United States, 204 F3d. at  
12 1089-90. One is forced to conclude that petitioner's claim is time-barred. See  
13 Trenkler v. United States, 268 F.3d at 24-27. In absolute terms, petitioner has  
14 presented the court with no factor to weigh in determining whether there has  
15 been equitable tolling of the AEDPA limitations period.

#### 19 IV. CONCLUSION

20 In view of the above, I find that petitioner Xavier Hernandez-Albino has  
21 failed to establish that his counsel's representation fell below an objective  
22 standard of reasonableness. See Strickland v. Washington, 466 U.S. at 686-87;  
23 United States v. Downs-Moses, 329 F.3d 253, 265 (1st Cir. 2003). Petitioner's  
24 arguments, verbose as they are, are totally undeveloped. It is a settled rule that  
25 "issues adverted to in a perfunctory manner, unaccompanied by some effort at  
26 developed argumentation, are deemed waived." Nikijuluw v. Gonzales, 427 F.3d  
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4 115, 120 n.3 (1<sup>st</sup> Cir. 2005); United States v. Zannino, 895 F.2d 1, 17 (1st Cir.  
5 1990). I also find that petition's motion is definitely time-barred and not subject  
6 to consideration due to equitable tolling of the AEDPA limitations period.  
7 Equitable tolling "should be invoked only sparingly." Ramos-Martinez v. United  
8 States, 638 F.3d at 322, cited in Estabrook v. Gerry, 2011 WL 5330787 at 4 (Sep.  
9 8, 2011). This is not a case which invites equitable tolling. Discussing the  
10 grounds for relief more than superficially defeats the entire purpose of the  
11 limitations caveat.  
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14 In view of the above, I recommend that petitioner's motion to vacate, set  
15 aside, or correct sentence under 28 U.S.C. § 2255 be DENIED without evidentiary  
16 hearing.  
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18 Under the provisions of Rule 72(d), Local Rules, District of Puerto Rico, any  
19 party who objects to this report and recommendation must file a written objection  
20 thereto with the Clerk of this Court within fourteen (14) days of the party's receipt  
21 of this report and recommendation. The written objections must specifically  
22 identify the portion of the recommendation, or report to which objection is made  
23 and the basis for such objections. Failure to comply with this rule precludes  
24 further appellate review. See Thomas v. Arn, 474 U.S. 140, 155 (1985); Davet  
25 v. Maccorone, 973 F.2d 22, 30-31 (1st Cir. 1992); Paterson-Leitch Co. v. Mass.  
26 Mun. Wholesale Elec. Co., 840 F.2d 985 (1st Cir. 1988); Borden v. Sec'y of Health  
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& Human Servs., 836 F.2d 4, 6 (1st Cir. 1987); Scott v. Schweiker, 702 F.2d 13,  
14 (1st Cir. 1983); United States v. Vega, 678 F.2d 376, 378-79 (1st Cir. 1982);  
Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980).

At San Juan, Puerto Rico, this 22d of February, 2012.

S/ JUSTO ARENAS  
United States Magistrate Judge